IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1554

COUNTY COURT ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

against

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Counterstatement of the Questions Presented

1. Whether a defendant is entitled to federal review of his claim that a State statute is unconstitutional, where the state's highest court has previously ruled that the statute was constitutional on its face and the defendant had argued in the trial court and at every stage of the State appellate proceedings that the statute was unconstitutional as applied in his case.
2. Whether a defendant who did not take a direct appeal to this court from the state highest court is entitled

to challenge the constitutionality of a state statute by federal habeas corpus proceedings.

3. Whether New York Penal Law § 265.15(3), which provides that in most circumstances all persons in a car are presumed by their mere presence jointly to possess any weapon found therein, is unconstitutional on its face and/or as applied in this case.

4. Whether a federal court may reach the question of whether a state statute is unconstitutional on its face, once the court has determined that the statute is unconstitutional as applied in the present proceeding and that it is incapable of being construed in such a manner so as to limit it to cases in which it could be applied constitutionally.

Summary of Argument

The United States Court of Appeals for the Second Circuit was correct in holding that respondents exhausted all state remedies and state procedural requirements as to their constitutional claim that New York Penal Law § 265.15(3) is unconstitutional before petitioning the federal courts. New York State's highest court has repeatedly held that this statute is constitutional. Respondents argued that the presumption was unconstitutional as applied in the trial court and at every stage of their direct appeal. The New York Court of Appeals did not find, and could not properly have found, that respondents waived this issue by failing to object to an omission in the judge's charge. Rather, the Court of Appeals only found waiver as to a state law claim which respondents had also argued on appeal (Point I).

Respondents' application for federal review of their constitutional claim under 28 U.S.C. § 2254 was proper. They were not required, as petitioners maintain, to seek

such review by direct appeal under 28 U.S.C. § 1257 (Point II).

The Second Circuit was also correct in holding that New York Penal Law § 265.15(3) is unconstitutional, both on its face and as applied in this case. All of the persons in an automobile may not rationally be presumed, by their mere presence, to jointly and simultaneously possess any weapon found therein. The legislative history of this provision establishes that it was enacted not because it was rational, but rather because prosecutors could not convince judges or juries that such an inference was rational. The presumption is intended improperly to shift the burden of proof to the defendant. In the present case, that presumption was employed by the State to produce the patently irrational conviction of the three respondents on charges that they jointly possessed two weapons found in a fourth passenger's purse (Point III).

The federal Court of Appeals was also correct in reaching the issue of whether the presumption was unconstitutional on its face, after first determining that it was unconstitutional as applied and that it could not be construed in such a way as to limit it to cases in which it could be applied constitutionally (Point IV).

Counterstatement of the Case

A. The Facts of the Case

On March 28, 1973, the three respondents and one "Jane Doe" (a sixteen year old juvenile), were stopped for speeding while riding in an automobile on the New York State Thruway (Tr. 345),[1] Respondent Lemmons was driving, Jane Doe was in the right front seat, and respondents Allen and Hardrick were in the back seat

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[1] References preceded by "Tr." are to the pages of the trial transcript.

(Tr. 187). When the officers radioed in Lemmons' driver's license identification number, they were advised that he was wanted on a fugitive warrant from Michigan, and he was accordingly arrested on that charge (Tr. 185). It was later determined that this information was incorrect and Lemmons was not wanted as a fugitive (55a),[2]

While the car was stopped, one of the troopers approached the right (passenger) side of the vehicle. Looking through the right front window, he could see Doe's handbag lying on the floor between the right side of the front seat and the right front door of the car. Protruding from the top of the bag was the handle of a gun. The trooper opened the door and seized the gun. A further search of the handbag revealed a second gun as well as various documents belonging to Doe (Tr. 187-91, 200). When questioned by the officers, Doe admitted that the handbag belonged to her (Tr. 200).

B. The Trial

The three respondents and Doe were subsequently all charged with possession of both of the guns. At trial, the State produced no proof that any of the respondents ever possessed either weapon. Rather, as the prosecutor conceded at the end of her case, the State proved only that Doe "was armed with at least two guns" (12a). To compensate for this lack of evidence, the State relied on New York Penal Law § 265.15(3), which provides that under most circumstances, all persons in a car are presumed by their mere presence jointly to possess any weapon found therein (12a-17a). The State concedes that

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[2] References followed by "a" are to the joint appendix.

Later, at the state police barracks, the officers also searched the trunk of the car, uncovering a machine gun and approximately one pound of heroin (Tr. 373-74). The car was shown to belong to Respondent Lemmons' brother (Tr. 19), however, and the three respondents and Doe were all acquitted of the charges that they had possessed those items.

the presumption provided "the only basis for the conviction" in this case (Pet. 34a;[3] see also joint appendix at 12a-17a; Petitioners' brief at 5).

At the close of the State's case, when it first became evident that the prosecutor was relying on the statutory presumption, respondents moved for a dismissal of the charges, arguing that the presumption could not validly be applied in this case and that absent the presumption, there was no evidence on which the jury could return a guilty verdict (12a-17a). In support of that claim, they also argued that the "on the person" exception to the presumption rendered it inapplicable in this case (12a-17a). The trial court denied that motion (17a) and thereafter charged the jury as to the presumption without charging the exception (22a-23a).

The jury subsequently convicted all three respondents, as well as Doe, of each possessing both of the guns.

Before judgment was imposed, respondents again attacked the statutory presumption in a written motion to set aside the verdict. The motion itself asserted that resort to the presumption set out in § 265.15 "was improper both statutorily and constitutionally."[4] The accompanying memorandum of law presented two arguments in support of this claim. First, it argued that since the guns were found in Doe's handbag, the "on the person" exception rendered the presumption inapplicable in this case as a matter of state law. Secondly, it argued on the basis of *Leary* v. *United States*, 395 U.S. 6 (1969) that the presumption was unconstitutional as applied:

> "Secondly, if the presumption is applicable here, then it is unconstitutional as applied.

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[3] References preceded by "Pet." are to the Appendix of the petition for a writ of certiorari.

[4] This motion and the relevant portions of the accompanying memorandum of law are set forth in the joint appendix at 33a-38a.

In *Leary* v. *United States,* 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36.

• • •

Assuming that the presumption is constitutional on its face (*People* v. *DeLeon,* 32 N.Y.2d 944 (1973)), it is clearly unconstitutional as applied.

• • •

Without resort to the presumption, the evidence is totally insufficient to sustain the conviction. *People* v. *DiLandri,* 250 App. Div. 52 (1st Dept., 1937).

• • •

In conclusion, it is apparent that the statutory presumption set out in § 265.15 cannot apply to those who were merely occupants of this car. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons, Hardrich or Allen.'"[5]

The trial court denied this motion (Tr. 776) and then sentenced all three respondents to maximum terms of seven years incarceration on each of the two counts, the sentences to run concurrently.

C. The State Appeals

In their briefs to both of the State's appellate courts, respondents once again argued that the presumption was

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[5] This argument is set forth in its entirety in the joint appendix at 36a-38a.

(1) inapplicable as a matter of state law and (2) unconstitutional as applied.[6]

The majority in the Appellate Division affirmed without opinion. The dissenters agreed with respondents' state law argument. 44 A.D. 2d 243 (1975).

The majority in the New York Court of Appeals rejected both of respondents' challenges to the presumption. 40 N.Y.2d 505, 354 N.E.2d 836 (1976) (Pet. 37a-53a). Having previously held the presumption to be constitutional on numerous occasions, the Court's majority contented itself on this issue with merely noting that there was an "urgent need" for the presumption, given the difficulties prosecutors had in proving weapons possession without it (Pet. 44a-45a).

Since the dissent in the appellate division had accepted respondents' state law argument, the majority in the Court of Appeals devoted most of its opinion to that issue. It was only as to that issue, and not the constitutional claim, that the Court found waiver. It ruled that since respondents had not objected to the judge's failure to charge the "on the person" exception to the presumption, they had waived their right to argue that that exception was controlling as a matter of state law (Pet. 45a-48a).

The dissenters in the New York Court of Appeals accepted both of respondents' arguments, holding that the presumption was inapplicable as a matter of state law and as a matter of constitutional law (Pet. 49a-53a).

D. The Federal Courts

Respondents thereafter filed an application pursuant to 28 USC § 2254 in the District Court for the Southern Dis-

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[6] This portion of respondent's brief to the Appellate Division is set forth in the joint appendix at 39a-44a. The corresponding portion of respondent's brief to the New York Court of Appeals is set forth in the joint appendix at 45a-52a.

trict of New York.[7] In that Court, they argued *inter alia,* that the presumption was unconstitutional, both on its face and as applied in this case (6a-9a).

The District Court, applying the "more-likely-than-not" test of *Leary* v. *United States, supra,* held that the presumption was unconstitutional as applied:

> "The test for the constitutionality of a presumption has been stated as whether 'the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.' *United States* v. *Leary,* 395 U.S. 6, 36 (1969).
>
> • • •
>
> Thus, here, was it 'more likely than not' that from the mere presence of two guns in a woman's handbag, 'possession' by three others in the car could be reasonably inferred? I conclude that in the circumstances of life that inference does not reasonably follow."
>
> (Pet. 35a)

The District Court rejected the State's argument that respondents had waived their constitutional claim by failing to renew their objection after the judge omitted the "on the person" exception from his charge. Rather, the Court held that since the presumption could not constitutionally be applied in this case, and since the State had conceded that it provided the "only basis" for conviction, respondents were entitled to a dismissal at the end of the State's case, purely as a matter of constitutional law (Pet. 34a-35a).

The Second Circuit, applying the same constitutional test, concluded that possession of a weapon could not rationally be inferred from one's mere presence in an automobile in which that weapon was found (Pet. 26a). Rather,

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[7] This petition is set forth in the joint appendix at 2a-10a.

it held that such an inference would depend on many variables, including the number of persons in the car, their relationship with one another, their ownership and past use of the car, their familiarity with it, the size of the vehicle and the size, location and visibility of the gun (Pet. 27a-29a). Since it would therefore be impossible to construe this presumption in such a way as to limit it to cases in which it would be constitutionally valid, the Court held that the presumption was unconstitutional on its face (Pet. 26a).

The concurring opinion in the Second Circuit held that the court should not reach the issue of the presumption's facial constitutionality. Rather, it should limit its decision to a holding that the presumption is unconstitutional as applied in this case, and deal with other unconstitutional applications of this statute on a case-by-case basis (Pet. 30a-32a).

The Second Circuit unanimously denied petitioners' application for rehearing *en banc* (Pet. 1a).

ARGUMENT

POINT I

Respondents fully exhausted their state remedies and complied with all state procedural requirements necessary to preserve their constitutional claim for federal review.

New York State's highest court has repeatedly held that the presumption authorized by New York Penal Law § 265.15(3) is constitutional on its face. Moreover, respondents argued to the trial court and at every stage of their state appeal that the presumption was unconstitutional as applied in this case and that absent the presumption, the State had failed to present any evidence upon which their convictions could be based.

Petitioners are incorrect in alleging that the New York Court of Appeals held that respondents had waived this issue by failing to object to the omission of the "on the person" exception to the presumption in the judge's charge. Rather, that court only found that respondents had thereby waived their argument that the "on the person" exception rendered the presumption inapplicable to this case as a matter of state law.

Respondents have thus exhausted all state remedies and state procedural requirements relevant to their constitutional challenge to the presumption. The application of the presumption in this case produced a grave miscarriage of justice; four persons were convicted of jointly possessing two guns, even though both guns were found in one person's purse and there was no actual evidence of possession by any of the other three. Consequently, respondents were entitled to review of their constitutional claim by the federal courts.

A. The presumption was challenged at every stage of the state proceedings.

Respondents first challenged the presumption at the earliest possible moment in the trial proceedings, namely at the close of the State's case when it first became obvious that the State had no actual evidence of possession and was relying instead on the presumption. At that juncture, respondents orally moved to dismiss the charges, arguing that the presumption could not validly be applied to them, and that without it, the State had no proof of guilt (12a-17a).

The trial court denied the motion to dismiss and then charged the jury that they could convict on the basis of the presumption. The jury thereafter returned a verdict convicting each of the three respondents, as well as the fourth passenger in the car, Jane Doe, of possession of both of the guns found in Doe's purse.

Before judgment was imposed, respondents renewed their argument that the presumption was invalid in a written motion asking the trial court to set aside the verdict. In that motion, they specifically challenged the State's resort to the presumption in this case as being "improper both statutorily and constitutionally."[8] As for their statutory challenge, they argued that since the guns were found in Doe's purse, the "on the person" exception to the presumption rendered it inapplicable as a matter of state law (35a-36a). Secondly, they argued that the presumption was unconstitutional as applied, on the basis of the test articulated by this Court in *Leary* v. *United States*, 395 U.S. 6 (1969):

> "Second, if the presumption is applicable here, then it is unconstitutional as applied.
>
> In *Leary* v. *United States*, 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36.
>
> The New York test has been held to conform to that set out in *Leary;* though the actual language is somewhat different (i.e. 'based on life and life's experiences', there is a 'fair', 'natural' and 'rational' connection between the fact proved and the fact to be presumed or inferred). *People* v. *McCaleb*, 25 N.Y.2d 394, 400-401 (1969); *People* v. *Terra*, 303 N.Y. 332, 335 (1951) app. dism'd. 342 U.S. 938; *People* v. *Reisman*, 29 N.Y.2d 278, 286 (1971).
>
> Assuming that the presumption is constitutional on its face (*People* v. *DeLeon*, 32 N.Y.2d 944 (1973)), it

[8] This quote from the motion papers is set forth in the joint appendix at 34a. The motion and the relevant portions of the accompanying memorandum of law are set forth in the joint appendix at 33a-38a.

is clearly unconstitutional as applied."

(36a-37a)

Respondents then proceeded to argue at some length that the presumption was irrational in the context of this case and that absent the presumption, there was no evidence of guilt. They concluded by again asserting:

> In conclusion, it is apparent that the statutory presumption set out in § 265.15 cannot apply to those who were merely occupants of this car. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons, Hardrich or Allen.[9]

(38a)

The trial court denied respondents' motion to set aside the verdict. Respondents then repeated these same arguments verbatim in their briefs to both the Appellate Division[10] and the New York Court of Appeals.[11]

B. Respondents' claim that the presumption is unconstitutional as applied to this case was preserved for federal review.

It is thus clear that respondents raised the issue that the presumption was unconstitutional as applied in the trial court and at every stage of the state appeals process. Having fully "exhausted the remedies available in the courts of the State" (28 U.S.C. 2254) and having given all

[9] Respondents' affirmation in support of their motion to set aside the verdict is set forth in its entirety in the joint appendix at 35a-38a.

[10] The portion of respondents' brief to the Appellate Division Third Department which contains this argument is set forth in the joint appendix at 40a-44a.

[11] The portion of respondents' brief to the New York Court of Appeals which contains this argument is set forth in the joint appendix at 48a-52a.

three state courts an "initial opportunity to pass upon and correct" this violation of constitutional rights (*Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971)), respondents were thereafter entitled to seek relief on this issue in the federal courts.

Petitioners, in an effort to convince this Court that respondents failed to exhaust their state remedies, first insisted that respondents "failed . . . to attack the statute itself on any ground at any point" in the state proceedings (Petitioners' brief at 10). Although later conceding that respondents did challenge the statute, petitioners still claimed that that challenge was limited to an argument that the "on the person" exception to the presumption rendered it inapplicable to this case as a matter of state law.[12]

At no point in their statement of facts or their entire discussion of respondents' state court claims[13] do petitioners even acknowledge the above-quoted argument from respondents' trial and appellate papers, which squarely presents the constitutional claim. Instead, petitioners

[12] Thus, petitioners' brief states:

"B. Respondents' State Court Claims

The record clearly shows that the entire thrust of the claim respondents pressed in state court is that Penal Law § 265.15(3) should not have been applied to them because the guns were in Jane Doe's purse and thus upon her person within the meaning of one of the exceptions set forth in the statute.

• • •

After the jury returned with guilty verdicts on the two handguns counts, the respondents moved to set aside the verdicts on the same grounds upon which they moved to dismiss the indictment, i.e. that as a matter of state law, they were entitled to the benefit of the 'on the person' exception. They presented this same argument to the Appellate Division, which affirmed without opinion, and finally to the Court of Appeals."

Petitioners' brief at 11-13.

[13] Petitioners' brief at 11-14.

totally ignore these portions of respondents' state court papers, and then insist that the constitutional issue was never raised in the state courts. Thus, petitioners' waiver argument is based on a substantial misrepresentation of the relevant facts.[14]

C. Respondents' claim that the presumption is unconstitutional on its face was preserved for federal review.

Prior to the trial and appeal in this case, the New York Court of Appeals had repeatedly held that the presumption in question was constitutional on its face. See e.g. *People* v. *Gerschinsky,* 281 N.Y. 581, 22 N.E.2d 161 (1939); *People* v. *Rogalski,* 281 N.Y. 581, 22 N.E.2d 160, (1939); *People* v. *Russo,* 303 N.Y. 673, 102 N.E.2d 833 (1951); *People* v. *DeLeon,* 32 N.Y.2d 944, 300 N.E.2d 734 (1973); See also *People* v. *Leyva,* 38 N.Y.2d 160 (341 N.E.2d 546 (1975)). This ruling became so firmly established that in *People* v. *Russo, supra,* for example, the Court contended itself with a one sentence opinion stating merely:

> "The Court has already declared § 1898-a [(now § 265.15(3))] of the Penal Law to be constitutional."
>
> *Id.,* 303 N.Y. at 673, 102 N.E.2d at 833.

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[14] Petitioners do drop one footnote later in their brief which begrudgingly acknowledges that respondents made a "fleeting reference to the federal standard articulated in *Leary* v. *United States,* 395 U.S. 6 (1969)," when they challenged the presumption in the state courts (Petitioners' brief at 15, fn.). This, petitioners dismiss on the ground that except for *Leary,* "the argument placed complete reliance upon New York cases. It is thus apparent that respondents never articulated a federal constitutional claim in state court" (Id. at 15, fn.). *Leary,* is, of course, widely recognized as the leading case articulating the due process test mandated by the Federal Constitution in statutory presumption cases. Moreover, the cases cited in respondents' state court papers, from both New York and other jurisdictions, all applied the federal constitutional test. Consequently, respondents were clearly alleging a violation of their rights under the federal constitution each time they made this argument.

In the face of these uniform decisions over a span of several decades by the State's highest court, it would have been utterly futile for respondents to have urged the trial court to declare this presumption unconstitutional on its face. Consequently, in their arguments at trial and on appeal, they quite properly cited the highest court's most recent decision holding the presumption facially constitutional,[15] and then went on to argue that the provision was unconstitutional as applied in this case.

This was more than adequate to preserve the facial constitutionality issue for federal review. 28 USC § 2254 expressly relieves habeas corpus applicants of the obligation of exhausting "ineffective" state remedies. This Court and the Circuit courts have interpreted that provision to mean that where the highest state court has addressed itself to the issue raised in prior cases, and there is no indication that the state court intends to depart from those former decisions, the exhaustion doctrine does not require a petitioner to argue that issue in state court before seeking relief by habeas corpus from a federal court. See e.g. *Wilwording* v. *Swenson,* 404 U.S. 249, 250 (1971); *Perry* v. *Blackledge,* 417 U.S. 21, 23-4 (1974); *Sarzen* v. *Gaughan,* 489 F.2d 1076, 1082 (1st Cir. 1973); *Stubbs* v. *Smith,* 533 F.2d 64, 68-9 (2d Cir. 1976); *Ham* v. *North Carolina,* 471 F.2d 406, 407-08 (4th Cir. 1973); *Jackson* v. *Alabama,* 530 F.2d 1231, 1233 fn. 5 (5th Cir. 1976); *Lucas* v. *Michigan,* 420 F.2d 259, 261 (6th Cir. 1970).

Moreover, respondents' claim that the presumption is unconstitutional on its face is substantively identical to the "unconstitutional as applied" argument which respondents raised at every stage of the state proceedings. As the

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[15] Respondents' motion to set aside the verdict, set forth in the joint appendix at 37a; respondents' brief to the Appellate Division, set forth in the joint appendix at 42a; respondents' brief to the New York Court of Appeals, set forth in the joint appendix at 50a.

Second Circuit pointed out in concluding that state remedies had been exhausted in this case, both of these issues required the court to apply the test of *Leary* v. *United States,* 395 U.S. 6, 29-54 (1969) to determine the empirical validity of concluding possession from mere presence. *Allen* v. *County Court Ulster County,* 568 F.2d 998, 1001-1003 (2d Cir. 1977) (Pet. 10a-13a). Since the state courts thus had a first full opportunity to pass on this issue, the respondents were thereafter entitled to raise it in the federal courts. *Wilwording* v. *Swenson,* 404 U.S. 249 (1971); *Picard* v. *Connor,* 404 U.S. 270, 275-78 (1971).

D. Respondents did not waive their right to challenge the constitutionality of the presumption by failing to object to the omission of the "on the person" exception to the presumption from the judge's charge. The New York Court of Appeals did not hold that respondents had waived their constitutional claim; rather, that court found waiver only as to respondents' argument that the presumption was inapplicable to their case as a matter of state law.

Respondents presented the state courts with two reasons why the presumption in question should be held to be inapplicable in their case. In addition to arguing that the presumption was unconstitutional as applied, they also argued that since the guns were found in Doe's purse, the "on the person" exception to the presumption rendered it inapplicable in this case as a matter of state law. When they first raised this latter argument in their motion to dismiss at the end of the State's case, the trial court denied it (12a-17a) and thereafter instructed the jury that they could convict on the basis of the presumption without making any reference to the "on the person" exception (25a). Respondents did not renew their claim concerning the "on the person" exception by objecting to this omission from the court's charge. They did, however, thereafter raise both their state law and their constitutional challenges to the presumption in their motion to the trial court to set aside the verdict (33a-38a). The trial court also denied that motion.

Respondents raised both of these challenges to the presumption in their brief to the Appellate Division: Third Department (40a-44a). The majority of that Court affirmed without opinion. The dissenters accepted respondents' state law claim, holding that since the guns were found in Doe's purse, the "on the person" exception rendered the presumption inapplicable as a matter of state law. 44 A.D.2d 243 (1975).

Respondents also raised both their state law challenge and their constitutional challenge to the presumption in the New York Court of Appeals. The majority there rejected both arguments. Having previously held on numerous occasions that this presumption is constitutional, the Court's majority did not expressly address that issue. Rather, it simply noted that there was an "urgent need" for the presumption, given the difficulties prosecutors had in proving weapon possession without it[16] (44a-45a).

Since the dissent in the Appellate Division had accepted respondents' state law argument, the majority in the Court of Appeals devoted most of its opinion to that issue. It was only as to the issue, and not the constitutional claim, that the Court found waiver. The question of whether the guns in Doe's purse were on her person was "primarily a question of fact," the court reasoned (*Id.,* at 45a). Since the jury was never instructed as to the "on the person" exception, they were never given a chance to make this factual determination.

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[16] This justification, incidentally, was consistent with the constitutional test of a presumption's validity which was in effect at the time the presumption in this case was enacted. *Morrison* v. *California,* 291 U.S. 82 (1934) held that a fact could properly be presumed, absent rebuttal, where it was more convenient for the defendant than the prosecutor to adduce evidence of the presumed fact. (See Point IIIA 4, *infra* at 38-39).

The Court thus concluded that respondents, by failing to object to this omission in the judge's charge, had waived their right to thereafter argue that the "on the person" exception rendered the presumption inapplicable to this case as a matter of state law. "As a result, what we view as a jury question was never presented to the jury . . ." (Id., at 47a).[17] Since respondents' challenge to the constitutionality of the presumption was indisputably not a "jury question", the New York Court of Appeals was obviously not referring to that issue when they made this finding of waiver.

It is thus clear that the New York Court of Appeals did not hold that respondents had waived their constitutional claim by failing to object to the charge; nor could it properly have so held. By failing to object to the omission in the judge's charge, respondents waived, at most, their right to challenge that omission as reversible error on appeal. That omission was totally irrelevant, however, to the question of the presumption's constitutionality. Rather, as the federal district court correctly held in this case, respondents' entitlement to a dismissal of the charges against them crystallized at the conclusion of the government's case, when the prosecution stated that it was relying on the presumption to establish the possessory elements of the crimes charged (12a-17a). Absent the presumption, there was simply no evidence to sustain a conviction. *People* v. *DiLandri,* 240 A.D. 52 (1st Dept., 1937); *People ex rel. DeFeo* v. *Warden of City Prison,* 136 Misc. 835 (Sup. Ct., Kings Cty., 1930); *People* v. *Logan,* 94 N.Y.S2d 681, 683-4 (Sup. Ct., Kings Cty., 1949); *People* v. *Joseph,* 93 Misc. 2d 267 (Sup. Ct., N.Y. Cty., 1978); *People*

[17] The dissenters in the Court of Appeals accepted both of respondents' arguments. In their view, the "on the person" exception made the presumption inapplicable as a matter of state law and the *Leary* test made it inapplicable as a matter of constitutional law (appendix to the petition at 49a-53a).

v. *Alston,* 404 N.Y.S.2d 277 (Sup. Ct., Bx. Cty., 1978). Consequently, the State has repeatedly conceded that the presumption provided the "only basis" for the convictions in this case (Pet. 34a; see also joint appendix at 12a-17a; Petitioners' brief at 5). Since the presumption could not constitutionally fill this void in the State's proof, even a jury which was fully apprised of the "on the person" exception to the presumption could not have returned a valid verdict of conviction in this case. Rather, respondents were entitled from that point on to a dismissal of the charges. *Vachon* v. *New Hampshire,* 414 U.S. 478, 480 (1974).

Even if this Court were to find that the omission in the judge's charge was somehow relevant to respondents' constitutional challenge, however, respondents' failure to object to that omission would not constitute a state procedural default as to that issue. In *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), this Court held that the defendant's failure to comply with Florida's contemporaneous objection rule provided a state procedural ground which was dispositive of his case. Unlike Florida, however, New York does not require a strictly contemporaneous objection in order to preserve an issue for appellate review. Rather, New York Criminal Procedure Law § 470.05(2) provides that:

> ". . . a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered."

Since respondents expressly challenged the applicability of the presumption to their case, both in their motion to dis-

miss at the end of the State's case and in their motion to set aside the verdict, their failure also to register an "actual protest" to the judge's charge was not a waiver of the issue under § 470.05(2).

Moreover, New York case law has consistently held that "no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right." *People* v. *McLucas,* 15 N.Y.2d 204 N.E. 2d 845 (1965); *People* v. *DeRenzzio,* 19 N.Y.2d 45, 224 N.E. 2d 97 (1966); *People* v. *Arthur,* 22 N.Y.2d 325, 239 N.E. 2d 537 (1968); see also *United States ex rel. Schaedel* v. *Follette,* 447 F. 2d 1297, 1300 (2d Cir. 1971). Consequently, respondents' failure to object to the judge's charge would not provide a state ground for barring them from federal habeas review, even if it was relevant to their constitutional claim.

E. In those cases where a procedural default does occur, a defendant should not be barred from federal relief where his constitutional claim would have precluded any valid conviction and where he presented his constitutional claim to the trial court and at every stage of his direct appeal.

As explained in the preceding sections, respondents did not commit a procedural default with regard to their constitutional claim by failing to object to the judge's charge. Even if they had committed a procedural default, however, *Wainwright* v. *Sykes,* 433 U.S. 72 (1977) should not be extended to bar them from federal habeas review. Alternatively, cases such as this one should come within the "cause" and "prejudice" exception recognized in *Sykes.*

In *Sykes,* the defendant failed to raise his constitutional claim at trial or at any point in his direct appeal (Id., 433 U.S. at 75). Here, to the contrary, respondents challenged the presumption in question at the end of the State's case, in their motion to set aside the verdict, and at every stage

of their direct appeal. Consequently, unlike *Sykes,* the state courts here were given a full opportunity to consider respondents' constitutional claims during the direct proceedings. *Wilwording* v. *Swenson,* 404 U.S. 249, 250 (1971).

The principal distinction between this case and *Sykes,* however, is that in *Sykes,* the constitutional challenge went to only one item of evidence—the defendant's confession. Evidence *aliunde* the confession was fully sufficient to sustain a conviction. In fact, it was so substantial that this Court found no possibility of prejudice from the introduction of the challenged statement. *Wainwright* v. *Sykes, supra,* 433 U.S. at 91. Here, to the contrary, respondents are challenging a presumption which formed the very foundation of the State's case. As previously explained (*supra,* at 18-19), without that presumption, the evidence was legally and constitutionally insufficient to sustain a guilty verdict. Consequently, unlike *Sykes,* if respondents' constitutional claim is correct, there could have been no valid conviction in this case.

Given this distinction, the considerations which led this Court to a finding of "adequate and independent state grounds" in *Sykes* actually militate against such a finding in this case. Where the constitutional challenge goes merely to one item of evidence, a timely objection might lead to exclusion of that evidence by order of the court. Failing that, the prosecutor might still elect to withhold that item of evidence, rather than risk reversal on appeal. In either event, the case could thereafter proceed to a verdict which was free of that constitutional challenge. (*Wainwright* v. *Sykes, supra,* 433 U.S. at 88-89). Here, to the contrary, if the presumption had been eliminated from the case, respondents would have been entitled to a dismissal of the charges.

For the same reason, there was no motive for defense counsel to "sandbag" in this case. *Wainwright* v. *Sykes,*

supra, 433 U.S. at 89). A motive for "sandbagging" would exist only in those cases such as *Sykes,* where a defense counsel would fear that voicing his constitutional objection to a piece of evidence at trial might lead to exclusion of that evidence, thereby enabling the prosecution to secure a conviction which was immune from that constitutional challenge on appeal. Here, a successful challenge to the presumption at trial could not have lead to constitutionally valid conviction but rather only to a dismissal.

In *Sykes,* the Court also reasoned that the defendant's failure to register a timely objection prevented the trial court from making a factual record "with respect to the constitutional claim when the recollections of witnesses are freshest" (*Id.,* at 88). Here, there was no factual record to be made; respondents' claim that the presumption is unconstitutional is purely a question of law.

The Court was also concerned in *Sykes* that excusing the defendant's failure to raise his constitutional issue at trial would detract from the perception of the trial as the "main event," and deplete "society's resources" through unnecessary collateral proceedings (*Id.,* at 90). Such would not be the case here, however, since the trial court was given a full opportunity to rule on respondent's constitutional claim.

Consequently, the rationale behind the Court's decision in *Wainwright* v. *Skyes, supra,* is inapposite to this case. Moreover, federal review is clearly mandated under the "cause" and "prejudice" exception described in that case (*Id.,* at 84-5, 90-91). The record in this case establishes that there was no improper "cause" for any procedural default. As noted above, respondents had nothing to gain by "sandbagging." Moreover, given their repeated efforts to convince the trial court that the presumption could not validily be applied to this case, any failure to pursue that issue further was clearly not a tactical decision. Rather, any such failure was due, at worst, to

"inadvertence." *United States ex rel Schaedel* v. *Follette, supra,* 447 F.2d at 1300.

The "prejudice" to respondents from this violation of their constitutional rights is substantial. This is not a case where the defendant is arguing a technical violation of the exclusionary rule in the face of otherwise overwhelming proof of guilt. *Wainwright* v. *Sykes, supra.* Here, to the contrary, there was no proof that any of the respondents possessed the guns found in Doe's purse. Rather, they were convicted solely on the basis of an arbitrary and irrational statutory presumption. If their constitutional claim is correct, they are entitled to a reversal of their conviction and a dismissal of the charges. In this context, stringent application of a procedural requirement so as to bar them from that relief would clearly constitute a serious "miscarriage of justice." *Wainwright* v. *Sykes, supra,* 433 U.S. at 91.

POINT II

Respondents did not take a direct appeal to this Court from the state's highest court; consequently they are entitled to challenge the constitutionality of New York Penal Law § 265.15(3) by federal habeas corpus proceedings.

Respondents did not appeal directly to this Court from the decision of the New York Court of Appeals on their claim that the New York Penal Law § 265.15(3) was unconstitutional. Rather, they presented that claim, as well as their numerous other constitutional claims, to the federal district court in a habeas corpus proceeding pursuant to 28 U.S.C. § 2254.

Petitioners argue that *Wainwright* v. *Sykes,* 433 U.S. 72 (1977) should be extended to bar any defendant who is challenging the constitutionality of a state statute from raising that issue by federal habeas corpus. Instead, peti-

tioners insist, such defendants should be allowed to seek federal review only by taking a direct appeal to this Court under 28 U.S.C. § 1257.

Petitioners are unable to cite a single case which imposes, or even suggests, such a requirement. To the contrary, Congress and this Court have squarely rejected it. 28 U.S.C. § 2254 limits exhaustion requirements for habeas corpus proceedings to "remedies available in the courts of the State." Since this Court is not a state court, appeal to it is not a remedy "available in the courts of the state." *Fay* v. *Noia,* 372 U.S. 391, 435-36 (1963). Consequently, a defendant is not required to exhaust the proceedings available to him under 28 U.S.C. § 1257 before seeking habeas corpus relief from a federal district court. *Fay* v. *Noia, supra,* 372 U.S. at 435-36. Although *Fay* v. *Noia, supra,* involved the certiorari provisions of § 1257, § 2254 makes no distinction between petitioners who would have been eligible to take a direct appeal under § 1257 and those who would have been limited to seeking a writ of certiorari under that provision. The Court's statutory interpretation of § 2254 in *Fay* is therefore equally binding in cases such as the present proceeding where a defendant would have been entitled to take a direct appeal. Thus, this Court has not found waiver in habeas corpus appeals involving the constitutionality of a state statute despite the fact that the defendant did not take a direct appeal to this Court from the state's highest court. See e.g. *United States ex rel. Stevens* v. *McCloskey,* 239 F.Supp. 419, aff'd 345 F.2d 305, rev'd sub nom *Stevens* v. *Marks,* 383 U.S. 234 (1966).

Since petitioners' proposal would require an amendment of § 2254, they are obliged to take their recommendation to Congress, rather than to this Court, which lacks the power to adopt it:

> If the authority of the federal courts is to be more limited than that provided by the present [habeas corpus] statute, that limitation must be made by the Congress.
>
> *United States ex rel. Elliott* v. *Hendricks,* 213 F.2d 922, 929 (3d Cir. 1954).
>
> It follows that we should not write in limitations [in the habeas corpus statute] which Congress did not see fit to make.
>
> *Price* v. *Johnson,* 334 U.S. 266 284 (1948).

See also *Lockhart* v. *United States,* 136 F.2d 122, 124 (6th Cir. 1943).

Moreover, it is doubtful whether any branch of government could constitutionally adopt what petitioners suggest. Their proposal would suspend the right of habeas corpus review for any defendant entitled to direct appeal under 28 U.S.C. § 1257. Consequently, it would appear to violate Article 1, section 9, clause 2 of the United States Constitution. In this regard, petitioner's proposal is markedly different from 28 U.S.C. § 2244(c), which provides only that a defendant voluntarily waives his right to habeas corpus review if he elects instead to seek review by this Court under § 1257.

Petitioners insist that their proposal would serve "considerations of comity" (Petitioners' brief at 20). Comity is fully served, however, when the state courts have been given a first fair opportunity to pass on the constitutional issue. *Wilwording* v. *Swenson,* 404 U.S. 249 (1971). Thereafter, any interest the state may have in a speedy federal disposition is outweighed by this Court's interest in a full examination of the Constitutional issues by the lower federal courts:

> Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights becomes more meaningful when grounded in the full and complete record

> which the lower federal courts on habeas corpus are in a position to provide.
>
> *Fay* v. *Noia, supra,* 372 U.S. at 438.

Similarly, the state's interest in avoiding conflict with the lower federal courts is fully protected by their right to seek review by this Court of any adverse decision. *Id.,* 372 U.S. at 437-38.

Petitioners' claim that their proposal would serve federal interests in "judicial economy" is also invalid (Petitioners' brief at 21-22). To the contrary, petitioners' proposal would serve only substantially to increase this Court's case load. Any habeas corpus petition thus barred from the lower federal courts would surface instead as a § 1257 appeal on this Court's already overcrowded docket. At present, many such cases never reach this Court, having been disposed of, frequently on other grounds, by the lower federal courts. Moreover, those federal habeas cases which do eventually reach this Court are chosen by the Court under its certiorari powers, rather than being forced upon it as an appeal under § 1257.

Nor is petitioners' proposal likely to reduce the overall caseload of the federal judiciary, as petitioners insist. Most § 2254 applicants seeking to challenge the constitutionality of a state criminal statute have other constitutional challenges to their convictions as well. Since the latter cannot be raised on direct appeal under § 1257, petitioners' proposal would force each such defendant to initiate two federal proceedings instead of one—a § 1257 appeal challenging the constitutionality of the state statute, and a § 2254 proceeding raising the rest of his constitutional claims. Such duplication of cases is clearly not in the interests of judicial economy.

Finally, even if this Court should find merit in petitioners' new exhaustion requirement, it should not apply that requirement to bar respondents from habeas corpus review

in this case. This is not a case, such as *Wainwright* v. *Sykes, supra,* where the defendant failed to comply with an existing, clearly defined procedural rule. To the contrary, at the time respondents elected to proceed under § 2254 rather than § 1257, both the relevant statutes and the case law indicated that such an election was entirely proper. To bar respondents from the relief they have been granted because they did not follow a procedure which was previously not required of them and which is presently no longer available to them would be particularly unjust.

POINT III

New York Penal Law § 265.15(3) is unconstitutional on its face and as applied to this case.

New York Penal Law § 265.15(3) provides that in most circumstances, the presence of a firearm in a car is presumptive evidence of its possession by all persons occupying that car. In the present case, that presumption was employed to convict four persons of jointly and simultaneously possessing two guns found in one of those person's handbag. Application of the tests articulated by this Court establishes that this presumption is unconstitutional, both on its face and as applied in this case.

A. The presumption is unconstitutional on its face.

The Second Circuit, applying the test of *Leary* v. *United States,* 395 U.S. 6 (1969), held that the mere fact that people are present in a car does not make it more likely than not that they all jointly and simultaneously possess any weapon found therein. Indeed, the legislative history of this statute establishes that the presumption was enacted because without it, prosecutors were unable to convince juries or judges that such an inference was rational. The presumption was intended to shift the burden of proving who possessed the weapon to the defense. Conse-

quently, the Court correctly concluded that the presumption was unconstitutional on its face.

1. The presumption should be judged by the "reasonable doubt" standard.

In its most recent presumption cases, this Court judged the validity of the presumptions in question by applying two tests—the "more-likely-than-not" test and the "reasonable doubt" test. The former provides that a presumption is "unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* v. *United States,* 395 U.S. 6, 36 (1969). The latter requires that a statutory presumption be rejected unless "the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt." *Barnes* v. *United States,* 412 U.S. 837, 843 (1973). In *Leary* v. *United States, supra,* and in the portion of *Turner* v. *United States,* 396 U.S. 398 (1970), dealing with the cocaine presumption, the Court found that the presumptions in question were unconstitutional because they failed to satisfy even the more lenient "more-likely-than-not" test. In the portion of *Turner* v. *United States, supra,* dealing with the heroin presumption, as well as in its most recent decision on presumptions, *Barnes* v. *United States, supra,* the Court held that the challenged presumptions were constitutional because they satisfied even the "reasonable doubt" test. Since the Court has never been presented with a presumption which satisfied one test but not the other, it has never been required to determine which test is in fact controlling.

Respondents submit that the presumption in question in this case fails to satisfy either of these tests. In the event that this Court should conclude that the presumption satisfies the "more-likely-than-not" test but not the "reasonable doubt" test, however, the presumption should be held to be unconstitutional. The "reasonable doubt" test

is the more appropriate standard by which to judge this criminal law presumption.

The "more-likely-than-not" test, or rather the "rational connection" test from which it evolved,* was first articulated by the Court in judging a presumption in a civil case, *Mobile, J. & K.C.R. Co.* v. *Turnipseed,* 219 U.S. 35 (1910). Thereafter, it was also applied to criminal presumptions, without regard for the more stringent standard of proof in the latter cases. See *e.g., Tot* v. *United States,* 319 U.S. 463 (1943); *Leary* v. *United States, supra.*

The "more-likely-than-not" test is appropriate to the testing of civil presumptions, since it is consistent with the "preponderance of the evidence" standard by which verdicts are reached in such proceedings. In criminal trials where guilt must be established beyond a reasonable doubt, however, the relationship which must be shown between the proven and presumed facts in order to satisfy the "more-likely-than-not" test is simply not sufficient. This is particularly true in cases such as the present, where the statutory presumption authorizes an inference not merely of a single fact, but rather of guilt itself. For such an inference to be treated as valid merely because it was "more-likely-than-not" would constitute an unconstitutional dilution of the burden of proof. See generally *In re Winship,* 397 U.S. 358, 364 (1970). Consequently, a presumption should not be employed in a criminal case unless the connection between the proven fact and the inferred fact is so certain that a rational juror could find the inferred fact beyond a reasonable doubt.

Petitioners argue that the "more-likely-than-not" test is controlling in this case because this Court "has never applied the 'reasonable doubt' standard to federal law presumption" (Petitioners' brief at 28). That claim is simply incorrect; this Court applied the "reasonable doubt" test

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* See *Leary* v. *United States, supra,* 395 U.S. at 33 fn. 56.

in both of its most recent presumption cases—*Turner* v. *United States, supra,* and *Barnes* v. *United States, supra.*

Petitioners also insist that only the "more-likely-than-not" test should be applied here because state law presumptions are "entitled to a more lenient standard of review from the federal courts than federal law presumptions" (Petitioners' brief at 28-9). Constitutional due process recognizes no such distinction between the rights of federal and state defendants. To the contrary, this Court has repeatedly held that state statutory presumptions must comply with the same constitutional standard as federal statutory presumptions. See *e.g. Morrison* v. *California,* 291 U.S. 82 (1934); *Bailey* v. *Alabama,* 219 U.S. 219 (1911); *Mobile J. & K.C.R. Co.* v. *Turnipseed,* 219 U.S. 34 (1910); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *McFarland* v. *American Sugar Ref. Co.,* 241 U.S. 79 (1916); *Manley* v. *Alabama,* 279 U.S. 1 (1929); *Western & Atl. R.R.* v. *Henderson,* 279 U.S. 639 (1929); see also *United States* v. *Romano,* 382 U.S. 136, 139 (1965).

Even assuming *arguendo* that New York State could reduce the burden of persuasion in criminal cases, as Petitioners imply,* it has not done so. Consequently, its presumptions should comply with the same standard which it mandates for conviction—proof beyond a reasonable doubt. The presumption in this case should therefore be judged by that test.

2. Mere presence does not support an inference of possession.

Although respondents submit that the "reasonable doubt" standard is controlling here, they will hereafter discuss the presumption, as did the federal courts below, in terms of the more lenient "more-likely-than-not" test. If the presumption fails to satisfy even that test, it is clearly unconstitutional under any standard. *Leary* v. *United States, supra,* 395 U.S. at 36, n.64; *Turner* v. *United States, supra,* 396 U.S. at 405.

* Petitioners' brief at 28-29.

Under the "more-likely-than-not" test, the presumption in this case is unconstitutional unless it can at least be said with substantial assurance that all of the passengers in a car, by their mere presence, are more likely than not to be in simultaneous possession of any and all weapons found therein. Contrary to satisfying this test, the presumption here flies in the face of rationality. As the Court below found:

> We fail to find any rational basis for such an inference, either in logic or experience. There is nothing about the simultaneous presence of occupants and a gun in an automobile that makes it more likely than not that the former control the latter or that they even know of its presence. The presumption obviously sweeps within its compass (1) many occupants who may not know they are riding with a gun (which may be out of their sight), and (2) many who may be aware of the presence of the gun but not permitted access to it. Nothing about a gun, which may be only a few inches in length (e.g., as Baretta or Derringer) and concealed under a seat, in a glove compartment or beyond the reach of all but one of the car's occupants, assures that its presence is known to occupants who may be hitch-hikers or other casual passengers, much less that they have any dominion or control over it. Although New York has created exceptions to the presumption for three situations in which it would be especially anomalous to infer possession—where the gun is found upon the person of one of the occupants, where the weapon is found in an automobile being operated for hire by a licensed driver, and where one of the occupants has a license to carry the weapon—the presumption remains irrational in that class of cases in which it does apply.
>
> (Pet. 21a-22a)

The Court's conclusion is clearly correct. Day to day experience establishes that a person's mere presence is insufficient to establish his possession of items found in his vicinity. As this Court found in a related context in *United States* v. *Romano, supra,* 382 U.S. at 141:

> The United States has presented no cases in the courts which have sustained a conviction for possession based solely on the evidence of presence. All of the cases which deal with this issue and with which we are familiar have held presence alone, unilluminated by other facts, to be insufficient proof of possession.

Petitioners nevertheless seek to convince this Court that New York has redefined "possession," at least with regard to firearms possession, so as to make a person guilty of that crime if he is merely within "reach" of a weapon, i.e. if he is riding in a car in which the weapon is found (Petitioners' brief at 38). Such is clearly not the case, however. To the contrary, New York law requires that one have actual physical control or dominion over a weapon in order to possess it. New York Penal Law § 10.00(8). Merely being within reach of the weapon is not enough:

> The cases construing the word "possession" under section 1897 of the Penal Law make conviction impossible unless there is shown which occupant of the automobile possessed the pistol, and this notwithstanding the fact that its presence in an automobile makes it available for instant use by any of the occupants. (People v. Persce, 204 N.Y. 397; People v. Andreacchi, 221 App. Div. 136; People v. Kevlon, Id. 224.)
>
> *People ex rel. DeFeo* v. *Warden of City Prison,* 136 Misc. 836 (Sup. Ct., Kings Co., 1930).

Petitioners' novel definition of "possession" would also create a conflict with the fundamental tenet of New York Penal Law that every crime must involve a "voluntary act." New York Penal Law § 15.10. The fact that a person is

within "reach" of a weapon does not establish that he knows it is there, or that he has voluntarily placed himself within reach of it. *People* v. *Andreacchi, supra,* 221 A.D. at 136.

Since actual control or dominion is an essential element of this crime, the New York courts have uniformly held that, absent the presumption, a person could not be presumed to be in possession of a weapon found in a car merely because of his presence in that car:

> It cannot be held with any degree of certainty that the revolver which was found on the floor of the car belonged to the defendant or was in his constructive possession rather than in the possession of one of the other occupants of the car.
>
> *People* v. *DiLandri,* 250 A.D. 52 (1st Dept., 1937).

See also *People* v. *Anthony,* 21 A.D.2d 666 (1st Dept., 1964); *People* v. *Andreacchi, supra,* 221 A.D. at 136; *People ex rel. DeFeo* v. *Warden of City Prison,* 136 Misc. 836 (Sup. Ct., Kings Co., 1930); *People* v. *Logan,* 94 N.Y.S.2d 681, 683-4 (Sup. Ct., Kings Co., 1949); *People* v. *Joseph,* 93 Misc.2d 267 (Sup. Ct., N.Y.Cty. 1978); *People* v. *Alston,* 404 N.Y.S. 2d 277 (Sup. Ct., Bx. Cty., 1978).

3. The presumption in question was enacted because mere presence in a car did not support an inference of possession.

Ironically, the presumption in question was enacted, not because the inference authorized therein was rational, but rather because the courts and juries had uniformly rejected it as irrational. As the Court noted in *People* v. *Logan, supra*:

> The purpose sought to be achieved by the provisions of section 1898-a is plain . . . Prior to the passage, in 1936, of section 1898-a, and under the decisions which up until such time had construed the meaning to be given the word "possession," as contained in section 1897, it

was often found impossible to obtain convictions against occupants of automobiles in which a proscribed weapon was discovered. The difficulty which was thus encountered was born of the inability, under such circumstances, to fasten the onus of possession directly upon any one of the particular individuals then present in the car. It was because of this great handicap which thus confronted the prosecution officers that the late Mr. Justice Lewis in People ex rel. De Feo v. Warden of City of Prison, 136 Misc. 836, 241 N.Y.S. 63, called attention to "the urgent need for legislation making the presence of a forbidden firearm in an automobile or other vehicle presumptive evidence of its possession by all the occupants thereof." He also stated that: "Such an amendment would require the occupants of an automobile to explain the presence of the firearm and enable the court to fix the criminal responsibility for its possession."

Id., 94 N.Y.S.2d at 683

The court then went on to note that the presumption was to be invoked if "there is an absence of satisfactory evidence of the ultimate fact to be established, to wit: To which of the occupants is 'possession' attributable?" (*Id.*, 94 N.Y.S. 2d at 683.)

The New York Court of Appeals, in the present proceeding, confirmed that the presumption in question was enacted because of the "difficulties" prosecutors were having in securing convictions for weapons possession in automobiles without it (*People* v. *Lemmons, supra,* 40 N.Y.2d at 510) (Pet. 44a). It also confirmed that the conclusion of possession from mere presence was irrational:

> Traditional analysis precluded a finding that any of several occupants of the automobile was sufficiently close to the weapon as to be in actual possession of it.
>
> *Id.*, 40 N.Y.2d at 510 (Pet. 44a).

It was thus the very irrationality of this inference which created the "urgent need for legislation" statutorily authorizing it (*Id.*, 40 N.Y.2d at 510). Prosecutors were unable to persuade juries or appellate courts that an inference of possession from mere presence was justified in the absence of such statutory persuasion. Moreover, the presumption was to be invoked in precisely those instances when it was most unconstitutional, namely when the evidence alone would not justify such an inference.

The legislative history of this provision confirms this improper purpose. Petitioners, in an effort to convince this Court that the presumption was adopted because of its rationality, herald the commissions, "numerous public hearings," fifty point questionaire, and "exhaustive" studies which accompanied its adoption and later amendment. Those undertakings were not occasioned by this presumption, however; rather, they were concerned with revision of the entire New York Penal Code. The legislative documents relating to those proceedings in fact establish that the presumption in question was adopted with very little discussion. Moreover, on the few occasions that it was mentioned, it was justified not because it was rational, but rather because it was "necessary," given the difficulty of securing convictions without it. Thus, in their extensive description of the legislative history of this presumption (Petitioners' brief at 29-37), petitioners fail to cite a single instance in which the presumption was endorsed because it was rational.*

In 1936, when it was originally adopted, the presumption was supported solely on the basis that law enforcement

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* Indeed, petitioners can cite only one instance in the entire history of this presumption in which "reasonableness" was even mentioned. On that occasion, this term was used only in a table to one legislative report, and then only in reference to the desirability of excluding certain circumstances from the application of the presumption. REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON FIREARMS AND AMMUNITION, NEW YORK LEG. DOC. No. 29, 21 Table 5 (1962).

officials were encountering difficulty in proving possession of guns found in automobiles containing more than one passenger:

> Under these circumstances, it is practically impossible for the police authorities and the district attorneys to secure a conviction on the charge of unlawful possession of a gun.
>
> Bill Jacket for 1936 New York Laws, Chapters 216 and 390.

See also Public Papers of Governor Herbert H. Lehman—1936, 459 (1940).

Similarly, Senator Erway, author of the 1963 version of the presumption, wrote in urging the governor to sign the measure:

> The presumption of possession of a dangerous weapon in an automobile is most necessary to proper police work. Before this enactment, it was impossible to prove possession if the article was found in an automobile occupied by several people. The foregoing Bill has the wholehearted support of the New York State Troopers and the Police.
>
> Letter of Senator Erway of April 4, 1961, set forth in the Senate Bill Jacket for 1961 New York Laws, Chapter 500.

Other supporters of the 1963 version voiced the same sentiments:

> . . . if the weapon is found in an automobile and all persons in the automobile deny ownership, the police officer is helpless.
>
> Senate Bill Jacket for 1961 New York Laws, Chapter 500.

Although petitioners cite a "fifty point questionnaire . . . distributed to each of the sixty-two district attorneys,

nearly all criminal court judges in the state, police chiefs and numerous rod and gun clubs" as one of the state's undertakings which established the rationality of this presumption, that questionnaire in fact refutes petitioners' claims.* At no point in the questionnaire were those being polled requested to express their opinion as to the rationality of the presumption in question. Moreover, the responses to the four questions** which did pertain in some way to the vehicle presumptions set forth in § 265.15, established that those polled regarded those presumptions as being irrational as presently worded. Thus, 93 percent of those polled felt that the presumption af weapon possession should not apply to a passenger who was in a stolen car under duress. Eighty-six percent felt that the stolen car under duress. Seventy-one percent felt that the presumption should not apply to an "occupant who was neither the driver nor owner and who is unaware of the weapon which is kept out of sight in a glove, trunk or other

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* The questionnaire and responses are contained in the REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON FIREARMS AND AMMUNITION, N.Y. LEG. DOC. No. 29, 27-33 (1962).

** The questionnaire asked for yes or no answers to the following questions pertaining to the presumptions currently found in § 265.15:

> 35. Where there are multiple occupants of a stolen vehicle, should the presumption of possession arising from presence of a weapon (§ 1898) apply to an occupant there under duress:
>
> 36. Same as #35 for an occupant who is a police officer.
>
> 37. Do you know any reason why the list of weapons should be different in the case of the presumption for the stolen vehicle (§ 1898) from that in the case of an automobile other than a public omnibus (§ 1898-a)?
>
> 38. Should the presumption of possession arising from presence of a weapon in an automobile (§ 1898-a) apply to an occupant who is neither the driver nor owner and who is unaware of the weapon which is kept out of sight, in a glove, trunk or other compartment?

compartment." Nevertheless, § 265.15 still applies to all of these situations.

4. The presumption was enacted for the improper purpose of shifting the burden of proof on the element of possession to the defense.

In addition to confirming that the presumption was irrational, the history of this legislation also establishes that it was enacted for an unconstitutional purpose—namely to shift the burden of proving who possessed the weapon to the defense. As the New York Court of Appeals noted in this case, the presumption was intended to "require the occupants of an automobile to explain the presence of the firearm and enable the court to fix the criminal responsibility for its possession." (Pet. 45a).

In 1936, when this presumption was first enacted, the most recent case from this Court indicated that a presumption could shift the burden in this fashion if the evidence necessary for conviction was more likely to be available to a defendant than to the prosecution. *Morrison* v. *California,* 291 U.S. 82, 90-91 (1934). However, this "test of comparative convenience" was reduced to a "corollary" in *Tot* v. *United States,* 319 U.S. 463, 469 (1943) and then discarded altogether in favor of the "more-likely-than-not" test in *Leary* v. *United States, supra,* 395 U.S. at 34-35, 44-45.

It has thus now been firmly established that a presumption may not shift the burden of proving or disproving an element of the crime to the defendant, as this presumption does, merely because he is more likely to have access to the relevant evidence than the prosecution. Rather, to the extent that such a shift is inevitable in any situation in which a presumption is applied, it is constitutionally tolerable only when the presumption itself is first shown to be rational. *Barnes* v. *United States,* 412 U.S. 837,

846 n. 11 (1973); see also *Turner* v. *United States,* 396 U.S. 398, 408 n. 8; *Leary* v. *United States, supra,* 395 U.S. at 34: *Tot* v. *United States, supra,* 319 U.S. at 469. Since the presumption in this case does not satisfy that requirement, this shift in the burden of proof is impermissible.

B. The statutory presumption in New York Penal Law § 265.15(3) is unconstitutional as applied in this case.

The application of the presumption in this case produced the patently irrational result that all four passengers in a car were convicted of the simultaneous possession of the same two guns, even though the State's only evidence was of possession by only one of those passengers. The three respondents in this proceeding were all convicted merely because they were riding in the same car as one Jane Doe, in whose handbag both guns were found. That handbag, located between Doe's right leg and the right front car door next to which she was sitting was out of reach of the other three passengers, and the State introduced no evidence whatsoever to indicate that any of them had ever had actual or constructive possession of either of the guns or that they even knew that the guns existed.

Given these facts, the federal district judge and all three of the judges on the Second Circuit panel in this case found that respondents' convictions were constitutionally intolerable. Items in personal accessories, such as Jane Doe's handbag, have traditionally been regarded as being within the possession and dominion of the accessory's owner. Even New York case law recognizes this commonly accepted fact. *People* v. *Pugash,* 15 N.Y.2d 65 (1964), cert. denied, 380 U.S. 936, appeal dismissed, 382 U.S. 20 (1965). Moreover, the pocketbook had Doe's papers in it and Doe ad-

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• Indeed, the only instance in which "reasonableness" was even mentioned was in a table to one legislative report, and then, only in referring to one of the exceptions to the presumption.

mitted to the police that it was her bag. Respondent Lemmons was out of the car at the time of the seizure and respondents Hardrick and Allen were in the rear seat of the car, away from Doe and the guns. Under these circumstances, any claim that the three respondents as well as Doe all simultaneously possessed the guns in Doe's pocketbook "would verge on the irrational." *United States* v. *Tavoularis,* 515 F.2d 1070, 1075 (2d Cir. 1975).

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Petitioners have failed to cite a single decision by the New York Court of Appeals or a single legislative authority which has analyzed the presumption in question and found that it satisfied the "reasonable doubt" test or even the "more-likely-than-not" test. To the contrary, the history of this legislation establishes that it was enacted pursuant to the now discredited "test of comparative convenience", because of the difficulty prosecutors were encountering in convincing either courts or juries that such an inference was rational.

A statutory presumption is merely an aid to the jury in reaching a rational verdict; it may not be employed as a substitute for that process. *Tot* v. *United States, supra,* 319 U.S. at 467. Where, as here, legislative history, judicial interpretation and empirical analysis establish that the presumption has no rational basis in fact, it must be disallowed. Consequently, the Court below, applying the proper tests, declared this presumption unconstitutional. That decision should be upheld by this Court.

POINT IV

The Court below was correct in reaching the question of whether New York Penal Law § 265.15(3) was unconstitutional on its face, once the court had determined that the statute was unconstitutional as applied, and that it was incapable of being construed in such a manner so as to limit it to cases in which it could constitutionally be applied.

For the reasons set forth in Point III of this brief and the majority opinion of the Second Circuit in this case, the presumption in question is unconstitutional on its face. Although the concurring opinion in the Second Circuit does not dispute the correctness of this determination, it nevertheless urges that the federal courts should confine themselves to holding this statute unconstitutional as applied in this case. Regardless of whatever validity such restraint may have in other contexts, it is inappropriate here.

The Fifth and Fourteenth Amendments limit the power of a state legislature to make the proof of one fact evidence of the existence of the ultimate fact on which guilt is predicated. *Tot* v. *United States,* 319 U.S. 463, 467 (1943); *United States* v. *Romano,* 382 U.S. 140, 139 (1965). As this Court noted in both *Tot* and *Romano*:

> Where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.
>
> *Tot* v. *United States, supra,* 319 U.S. at 468;
> *United States* v. *Romano, supra,* 382 U.S. at 139.

Thus, the Court is dealing here not with an isolated governmental action which violated one, or a few, persons' constitutional rights at some time in the past. Rather, it is faced with an enactment of a state legislature which transgresses the limitations imposed on it by the federal Constitution

and continually violates the constitutional rights of those subjected to it as long as it remains in effect.

If § 265.15(3) is allowed to continue as a part of the New York Penal Law, despite its apparent unconstitutionality, large numbers of citizens will improperly be subjected to the deprivations, distress and expense of indictment, conviction and punishment. Some will belatedly be vindicated on appeal or by habeas petition to the federal courts, but only after they have suffered the irreparable injuries of trial and incarceration. Others, induced to plead guilty in order to limit their jeopardy, will never be set right.

Petitioners nevertheless insist that this Court, even when faced with a statute which is unconstitutional on its face, should eschew a holding to that effect, and limit itself only to granting relief to the parties before it. Since the "case or controversy" requirement (United States Constitution, Article III; *Buckley* v. *Valeo,* 424 U.S. 1, 11 (1976); *Baker* v. *Carr,* 369 U.S. 186, 204 (1962)) limits most challenges to such statutes to individual proceedings in which one of the parties claims to have been aggrieved by the operation of that statute, petitioners' position would preclude this Court from ever voiding an unconstitutional statute. Moreover, although the "case or controversy" requirement serves the salutary purpose of limiting unnecessary litigation, petitioner's proposal would have precisely the opposite effect, forcing the federal courts to entertain countless petitions by persons entitled to relief from enforcement of the same unconstitutional provision. Such redundancy would serve neither the interests of justice nor those of judicial economy.

Consequently, from the earliest days of its existence, this Court, when confronted with state statute which is unconstitutional on its face, has exercised the authority to declare it so. See, e.g., *M'Culloch* v. *Maryland,* 17 U.S. (4 Wheaton) 316 (1819). Thus, this Court has repeatedly held state statutory presumptions to be facially unconstitutional, even

though in each instance the issue was presented to the Court, as here, by individual litigants in the context of an individual case. See, e.g., *Manley* v. *Alabama,* 279 U.S. 1 (1929) (state statute creating a presumption of fraud from every bank insolvency, held unconstitutional on its face); *Western & Atl. R.R.* v. *Henderson,* 279 U.S. 639 (1929) (state statute creating a presumption of Railroad's negligence from fact of railroad crossing collision, held unconstitutional on its face); *McFarland* v. *Am. Sugar Ref. Co.,* 241 U.S. 79 (1916) (state statute creating presumption of participation in an illegal monopoly from (1) fact that defendant paid less for sugar in state than out of state or (2) fact that defendant kept his sugar refinery idle for more than one year, held unconstitutional on its face); *Baily* v. *Alabama,* 219 U.S. 219 (1911) (state statutory presumption making failure to perform a service prima facie proof of intent to defraud, held unconstitutional on its face).

Several factors make a finding of facial unconstitutionality particularly appropriate in this case. As the Court below recognized, this is not a case where imposing one or two clearly identifiable qualifications on the presumption in question would limit it to situations in which it could constitutionally be applied. Thus, for example, the Courts have held that certain presumptions concerning drugs are valid as to cocaine as long as they are applied only in cases involving "dealership quantities" of that drug. See, e.g., *Turner* v. *United States,* 396 U.S. 398, 415-18 (1970); *United States* v. *Gonzalez,* 442 F.2d 698 (2d Cir. 1971) (en banc), cert. denied sub nom. *Orvalle* v. *United States,* 404 U.S. 845 (1971); *Lopez* v. *Curry,* 583 F.2d 1188 (2d Cir. 1978).

Here, however, no such rehabilitation of the presumption is possible. Rather, as the Second Circuit recognized:

> . . . the empirical relationship between proved and presumed facts turns . . . on a variety of circum-

stances and on the largely unpredictable combinations in which they occur . . .

• • •

Absent direct evidence, an inference of joint possession [of a weapon] on the part of occupants [of a car] depends on many variables, including the number of occupants of the car, the nature of the relationships between them, their ownership or past use of the automobile, their familiarity with it, the size of the vehicle and the size location and visibility of the gun.

Allen v. *County Court, Ulster County, supra,* 568 F.2d at 1010 (Pet. 27a-29a).

Where a statute can be brought into line with Constitutional requirements, if at all, only after substantial "revision of its text," or revisions which would render the statute no longer "intelligible," a finding of facial unconstitutionality is clearly mandated. *United States* v. *Raines,* 362 U.S. 17, 22-3 (1960); *United States* v. *Reese,* 92 U.S. 214, 219-220 (1876); *Winters* v. *New York,* 333 U.S. 507, 518-20 (1948).

Similarly, a holding that this presumption is unconstitutional on its face is necessitated by the fact that this presumption is clearly unconstitutional in a vast majority of the cases in which it would apply. Rarely, if ever, would presence alone, unaided by other facts, be sufficient to establish possession. *United States* v. *Romano, supra.* 382 U.S. at 140. It is significant in this regard to note that following the Second Circuit's decision in this case, numerous New York Courts have held the presumption unconstitutional as applied to a variety of factual situations. See, e.g., *People* v. *Joseph,* 93 Misc.2d 267 (Supreme Court, New York County, 1978) (2 passengers in car); *People* v. *Alston,* 404 N.Y.S.2d 277 (Supreme Court, Bronx County, 1978) (gun in glove compartment).

Since this presumption would be unconstitutional in a vast majority of the cases in which it would arise, this Court should hold it unconstitutional on its face even if the Court finds that the presumption would be valid in a few isolated situations. Every statutory presumption which has been held by this Court to be unconstitutional on its face would have been valid in certain contexts. Thus, a railroad crossing collision might be presumptive of negligence on the part of the railroad where it was also shown that the railroad had failed to erect proper warning devices at that crossing. Nevertheless, this Court declared such a presumption unconstitutional on its face. *Western & Atl. R.R.* v. *Henderson,* 279 U.S. 639 (1929). A bank insolvency might be presumptive of fraud where it was also shown that the bank president had diverted the bank's funds to his own use. Nevertheless, this Court declared such a presumption unconstitutional on its face. *Manley* v. *Alabama,* 279 U.S. 1 (1929). Similarly, the presumption in this case should be set aside, even if it could be validly employed in a fraction of the cases it originally designed to cover. *United States* v. *Raines, supra,* 362 U.S. at 23; *Butts* v. *Merchants & Miners Transportation Co.,* 230 U.S. 126 (1913).

This is particularly true where, as here, the presumption "would be upheld only in instances where the evidence would, independent of the statute, support [the authorized] inference . . ." *Allen* v. *County Court, Ulster County, supra,* 568 F.2d at 1010 (Pet. 29a). In such cases, convictions could be secured without resort to the presumption. Consequently, petitioners' only possible reason for seeking to preserve this presumption is to have it available for those cases in which the evidence itself does not support an inference of possession. Yet, it is precisely those cases in which the presumption cannot constitutionally be applied. Since the presumption thus serves no valid purpose in any case and since its continued existence will result only in further

violations of constitutional rights, it should be voided at this time.

This issue is also governed by that line of cases holding that a statute must be invalidated

> . . . if the words of the statute or its legislative history make it indisputably clear that [the legislature] intended a result which is unconstitutional . . .
>
> *Buckley* v. *Valeo,* 519 F.2d 821, 878, affirmed in part, reversed in part, 424 U.S. 1 (1976).

See also *United States* v. *Thompson,* 452 F.2d 1333, 1341 (1971); cf. *King* v. *Smith,* 392 U.S. 309, 335-36 (1968) (Douglas, concurring). Here, both the words of the statute and those of its legislative supporters establish that this presumption was intended as an unconstitutional substitute for legitimate proof of possession, improperly shifting the burden of proof to the defendant in those instances where the prosecutor had no evidence of possession and could not convince the jury to infer possession from the evidence he did have.

Finally, this case is analogous to those cases in which a finding of facial unconstitutionality was mandated by the fact that unconstitutional application of the statute was "capable of repetition yet evading review." *Storer* v. *Brown,* 415 U.S. 724, 737, fn. 8 (1974). In determining whether to allow a statute such as the presumption in question to remain in effect, this Court cannot close its eyes to the practical effects of doing so. As previously explained, many innocent passengers in vehicles in which weapons are found will be improperly subjected to judicial jeopardy, imprisonment and expense as long as this statute continues in effect. Given the practical and legal demands of pursuing state appeals and federal habeas corpus proceedings, few will ever be vindicated. Considerations of comity are ill served at such a price.

Petitioners' reliance on *United States* v. *Raines,* 362 U.S. 17 (1960) and the other cases cited in their brief at 22 for the proposition that federal courts should always eschew facial analysis of a statute, is misplaced. Those cases hold only that one against whom a statute may constitutionally be applied does not have standing to argue that the statute is invalid in his case because it might be constitutional as applied to other persons. Here the statute in question was clearly unconstitutional as applied to respondents. Once that fact had been established, the federal courts were authorized, and indeed obliged, to determine whether the statute could be construed in such a fashion as to limit its application to cases in which it would be constitutionally proper. Since the presumption in this case could not be so construed, it was properly declared unconstitutional on its face.

CONCLUSION

The order and judgment of the United States Court of Appeals should be affirmed. New York Penal Law § 265.15(13) should be declared unconstitutional on its face and as applied in this case.

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Respectfully submitted,

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